INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	3
Reasons for granting the writ	10
Conclusion	22

CITATIONS

Cases:

Baltimore v. *McKim*, 3 Bland. 453	16
Baltimore & Ohio R. R. Co. v. *Chase*, 43 Md. 23	13, 16-17, 19
Barney v. *Keokuk*, 94 U. S. 324	14, 19
Cahill v. *Baltimore*, 173 Md. 450, 196 Atl. 305	14, 16, 19
Casey's Lessee v. *Inloes*, 1 Gill 430	16
Classen v. *Chesapeake Guano Co.*, 81 Md. 258	14, 19
Cramer v. *Perine*, 251 N.Y. 177	20
Day v. *Day*, 22 Md. 530	16
Giraud's Lessee v. *Hughes*, 1 Gill & Johns. 249	14, 16, 19
Goodsell v. *Lawson*, 42 Md. 348	16
Hammond's Lessee v. *Inloes*, 4 Md. 138	16
Horner v. *Pleasants*, 66 Md. 475, 7 Atl. 691	16
Johnston v. *Jones*, 1 Black 209	20
Marine Ry. Co. v. *United States*, 257 U. S. 47	11
Martin v. *Waddell*, 16 Pet. 367	11-12
Mobile, City of, v. *Sullivan Timber Co.*, 129 Fed. 298	14
Morris v. *United States*, 174 U. S. 196	5, 7, 11, 12, 13, 16, 21
New Orleans v. *United States*, 10 Pet. 662	19
Northern Pacific R. Co. v. *United States*, 330 U. S. 248	12
Potomac Steamboat Co. v. *Upper Pot. S. Co.*, 109 U. S. 672	19
Richardson v. *Boston*, 19 How. 263	19
Shively v. *Bowlby*, 152 U. S. 1	11, 14, 17
Shoemaker v. *United States*, 147 U. S. 282	13, 16
Sioux Tribe v. *United States*, 316 U. S. 317	12
Sollers v. *Sollers*, 77 Md. 148, 26 Atl. 188	16
Stull v. *United States*, 61 F. 2d 826	20
Tome Institute v. *Crothers*, 87 Md. 569, 40 Atl. 261	16
United States v. *Belt*, 319 U. S. 521	2, 21
United States v. *Belt*, 142 F. 2d 761	7, 13
United States v. *Dern*, 289 U. S. 352	11, 12, 14, 17, 18

Cases—Continued

	Page
United States v. *Hurley*, 63 F. 2d 137, affirmed *sub nom.* *United States* v. *Dern*, 289 U. S. 352	14, 18
United States v. *San Francisco*, 310 U. S. 16	12
United States v. *Turner*, 175 F. 2d 644, certiorari denied 338 U. S. 851	14
United States v. *Waddill Co.*, 323 U. S. 353	15
United States ex rel. Greathouse v. *Hurley*, 60 W.L.R. 162	18
Utah Power & Light Co. v. *United States*, 243 U. S. 389	12, 15
Wilson v. *Inloes*, 6 Gill 121	16
Wilson's Lessee v. *Inloes*, 11 Gill & Johns. 351	16

Constitution and Statutes:

U. S. Const. Art. I, Sec. 8	12
U. S. Const. Art. 4, Sec. 3, cl. 2	12
River and Harbor Act of March 3, 1899, sec. 11, 30 Stat. 1151, 33 U.S.C. 404	8, 12
Act of April 27, 1912, 37 Stat. 93	2, 3, 4, 9, 12, 21
Act of August 23, 1912, 37 Stat. 358	12
Judiciary Act of 1925, 43 Stat. 936, 941-942, Sec. 13	2, 21
Act of June 25, 1936, 49 Stat. 1921, now 28 U.S.C. 88, 132	2
Maryland Act of 1745, c. 9, sec. 10	17
Act of December 19, 1791, Md. Laws 1791, c. 45, D. C. Code (1940), p. xxviii	11

Miscellaneous:

S. Dov. No. 19, 62d Cong., 1st sess.	12
S. Doc. No. 462, 61st Cong., 2d sess.	12

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

LOTTIE MAY MARTIN, JAMES MARTIN, AND THE SMOOT SAND & GRAVEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on October 31, 1949, by the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the District Court (R. 97) is reported under the name of *United States* v. *Groen* at 72 F. Supp. 713. The opinion of the Court of Appeals (R. 736-738) is reported at 177 F. 2d 733.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1949 (R. 739). By order of the Chief Justice, dated January 25, 1950, the time for filing this petition was extended to March 30,

1950 (R. 741). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).[1]

QUESTIONS PRESENTED

Respondents are riparian owners on the Anacostia River, the title to the bed of which was ceded by Maryland to the United States in 1791. The courts below have held that, under Maryland common law existing prior to 1791, respondent's predecessors had riparian rights to make fills in the river and thus acquire from the state title to portions of the bed; that this power continued after cession, even though no Congressional legislation sanctions its exercise; and that, since cession, respondents have acquired the Government's title, by filling, to a substantial part of the former river bed.

The questions presented are:

1. Whether, in these circumstances, the United States can be divested of the title to the beds of navigable streams in the District of Columbia absent express grant or authorization of Congress.

2. Whether, assuming that the courts below were correct in resorting to the Maryland common law of the pre-cession period to determine the nature

---

[1] Section 5 of the Act of April 27, 1912, 37 Stat. 93, 94, under which this suit was brought, provided for a direct appeal to this Court from the Supreme Court of the District of Columbia (now the United States District Court for the District of Columbia, Act of June 25, 1936, 49 Stat. 1921, now 28 U.S.C. secs. 88, 132). This section was repealed by Section 13 of the Judiciary Act of 1925, 43 Stat. 936, 941-942. *United States* v. *Belt*, 319 U.S. 521.

and extent of riparian rights in government-owned rivers in the District of Columbia, they have correctly construed the law of Maryland.

3. Whether, in any event, the rights of riparian owners of land on a navigable stream in the District of Columbia are subordinate to the future power of the United States, in its capacity as proprietor and sovereign, to devote land below the natural high-water mark to public purposes (other than improvements in aid of navigation).

4. Whether whatever riparian rights are accorded respondents should also be accorded the United States as owner of fee title to land in a street terminating at the river.

STATEMENT

On April 27, 1912, the Congress enacted a statute "providing for the protection of the interests of the United States in lands and waters comprising any part of the Potomac River, the Anacostia River or Eastern Branch, and Rock Creek and lands adjacent thereto." 37 Stat. 93. This Act requires the Attorney General to institute suits to establish and make clear the title of the United States "in and to any part or parcel of the land or water in the District of Columbia in, under, and adjacent to the Potomac River, the Anacostia River or Eastern Branch, and Rock Creek, including the shores and submerged or partly submerged land, as well as the beds of said waterways, and also the upland immediately adjacent thereto, including

made lands, flats, and marsh lands;" such suits were to be in the nature of bills in equity and were to be brought against any persons or corporations who might have, or pretend to have, any right, title, claim, or interest adverse to the complete title of the United States. The Act further requires the defendants to set forth their claims and that the court make a final determination of every question of right, title, interest, or claim in the premises. Section 4 provides that if on the final hearing the court is of opinion that there exists any right, title, or interest adverse to the United States, then it shall forthwith and in a summary way proceed to ascertain the value thereof and report its conclusion to the Congress.

The present suit was instituted under the foregoing Act on January 30, 1913, to establish the title of the United States to certain land adjacent to and under the Anacostia River or Eastern Branch of the Potomac River (R. 2-3).[2] The land described ("Square East of 664") is located at the foot of South Capitol Street and is bounded on the west by Water Street, on the north by S Street, on the south by T Street, and on the east by the line of maximum depth of the Eastern Branch (R. 3).

In 1791, the States of Maryland and Virginia ceded to the United States an area ten miles square

[2] The names Anacostia River and Eastern Branch are synonymous and are used interchangeably throughout the suit and this petition.

for the establishment of a permanent seat for the Federal Government.[3] Included within the area ceded by the State of Maryland was that part of the Eastern Branch which is here involved. About the same time and in the course of the negotiations by the President of the United States and the Commissioners appointed to act under his supervision to locate the district for the seat of the Government, the owners of lots in the Town of Carrollsburg (which was located on the Eastern Branch in this vicinity) entered into an agreement with the President, whereby it was agreed that they would convey their lots and lands to be laid out at the pleasure of the President as part of the federal city and that they would receive one-half of the quantity of their respective lots "as near their present situation as may agree with the new plan" or failing this, have satisfaction in money (R. 315-316). Pursuant to this agreement, the proprietors in Carrollsburg conveyed their lots in trust to be laid out for the city (R. 66, par. 9(b); Pl. Exs. T-22 to T-27, R. 461-485) and were in turn allotted and assigned certain lots in the new city. Lots 1, 2, 3, 6, 7 and 8 in Square East of 664 were allotted to respondents' predecessors in title on June 26, 1794 (R. 181-183). Lots 4 and 5 were sold by the Commissioners to provide funds for public buildings and other purposes in connection with the

[3] The historical background and the details of the founding of the city of Washington are set out in *Morris* v. *United States*, 174 U.S. 196, a similar suit involving lands in and along the Potomac River. See also R. 100-105.

laying out of the city and were subsequently conveyed to respondents' predecessors in title (R. 73, par. 18(a); Findings Nos. 4-5, R. 115). These lots in original Square East of 664 have been extended into the Anacostia River by artificial fill,[4] and a wharf has been constructed which projects into the river along the south line of S Street (R. 91-92; Finding No. 8, R. 116).

In 1794 (the date of the allotment of lands to respondents' predecessors), the high-water line was an irregular line running a distance of 61 to 81 feet east of the easterly line of Water Street (Finding No. 6, R. 115; Pl. Ex. 7). As a result of filling, the present high-water line (with the exception of a small area not filled at the time of the trial) runs along the bulkhead line, a distance of 366 feet east of the easterly line of Water Street at the north of the square and 323 feet at the south of the square (Finding No. 8, R. 116; Pl. Ex. A).[5]

---

[4] The statement in the opinion of the court below (R. 737) that the land in Square East of 664 has been extended eastward into the river, "partly by natural accretion but largely by artificial fill," is apparently inadvertent since it was stipulated that none of the land between the high-water line of 1794 and the present high-water line was the result of natural accretion (R. 91-92), and the trial court found that the extension of the lots was by artificial accretion or fill (R. 116).

[5] It may be noted that while the term "high-water line of 1794" is synonymous with the "natural" high-water line, the date 1794 does not indicate the time when the natural high-water line was changed by artificial means. Since it was stipulated that the area between the high-water line of 1794 and the present high-water line is artificial fill (R. 91-92), no effort was made at the trial to establish the date when the filling occurred. However, the defendant Martin testified

The United States alleged in its complaint that it had title to all of the land described therein (R. 4-6). It was to have been contended that the United States had title to the original fast land described (as well as the filled land and land under water) because it lay between Water Street and the river and, as this Court held in *Morris* v. *United States,* 174 U.S. 196, it was intended under the original plans that the city of Washington be bounded by a waterfront street (Water Street) and that there should be no private ownership of land between that street and the river. However, for reasons not appearing of record, the trial of the case was delayed many years and in the meantime the court below held in another case (*United States* v. *Belt,* 142 F. 2d 761) that the plan of the founders of the city for a water street bounding the city had been abandoned as to lands along the Anacostia River. Accordingly, it was there held that the predecessors of persons claiming title to a square adjacent to that involved here had acquired title to the original fast land riverward of Water Street to the high-water line of the Anacostia River, together with riparian rights.

As a result of the decision in the *Belt* case, the Government conceded, in the present case, that respondents' predecessors acquired title to the

---

that he filled lots 6, 7 and 8 out to the bulkhead line in 1906 (R. 232). A comparison of a map of the area dated October 27, 1926 (Pl. Ex. T-21) and a map showing conditions at the time of the trial (Pl. Ex. A) shows that approximately half of the filled area has been made since 1926.

original fast land riverward of Water Street to the high-water line of the Anacostia River as of 1794, together with riparian rights (R. 52-53, 80). However, it was contended that the United States was and still is vested with title to all land below the high-water line of 1794 (R. 53, 69, par. 13(10)(a); R. 737).

The trial court held that by virtue of the cession to the United States in 1791 by the State of Maryland of that part of the District of Columbia which formerly lay in that state, the United States became vested with fee title to the soil below high-water mark on the Eastern Branch, rejecting a claim by respondents to fee title to the bed of the stream (R. 105-107). However, the trial court further held that respondents and their predecessors in title, being riparian owners, were entitled to whatever rights and privileges appertain to riparian property; that such rights include the right to fill and wharf out below ordinary high-water mark; that the establishment of harbor lines along the Eastern Branch by the Secretary of War (acting under the River and Harbor Act of March 3, 1899, sec. 11, 30 Stat. 1151, 33 U.S.C. 404) operated as a license or permit to fill to the bulkhead line and to build a pier to the pierhead line; and that defendants acquired title to land reclaimed by filling below high-water mark (R. 107-113). Accordingly, it entered findings of fact and conclusions of law in which it found that riparian rights, including the right to make fills

and build wharves, were appurtenant to respondents' lots and concluded that by exercising those rights respondents "acquired ownership and title to the reclaimed land landward of the bulkhead line," and that the United States "has no right, title or interest in any of the lands included in Square East of Six Hundred and Sixty-Four (E. of 664) nor in the wharf projecting from that square" (R. 117). Judgment was entered accordingly (R. 117-120, 122-125).

Upon appeal by the United States and cross-appeal by respondents, the Court of Appeals affirmed the judgment of the trial court insofar as it determined that by exercise of their riparian rights respondents had acquired title to the land filled in below the natural high-water mark of the river and the wharf extending out therefrom, and that the United States had no right, title, or interest in such lands or wharf; but the Court of Appeals directed that the judgment be modified so as to preserve the power of the United States to take the fill and wharf without compensation in the interest of navigation. The court below also affirmed the trial court's finding that the respondents owned no part of the present bed of the Anacostia River (R. 738).[6]

---

[6] Section 4 of the Act of April 27, 1912, 37 Stat. 93, 94, provided that if, on final hearing of suits brought under that Act to establish the title of the United States, the court was of opinion that there existed any right, title, interest, or claim adverse to the United States, it should proceed to ascertain the value of such right, title, interest, or claim and make a

REASONS FOR GRANTING THE WRIT

The lower courts have properly held that the United States has had title to the bed of the Anacostia River since 1791, and that neither respondents nor their predecessors have ever owned any part of that bed; but, at the same time, these courts have ruled that respondents and their predecessors, as riparian owners, have had the right, without legislative sanction, to make fills and build wharves and by the exercise of those rights acquire title from the United States to land in the river beds. This holding sharply departs from the fundamental principle that title to United States property can be divested only by express Congressional authority, threatens the interest and title of the United States in under-water lands owned by it, and misconstrues an important branch of District of Columbia real property law which is of concern both to the Government and to property owners.

---

report thereof to the Congress. In the present case, the trial court entered an order determining title on October 27, 1947, and setting the cause for hearing on the question of the value of respondents' property (R. 117-120). After a hearing, the trial court on January 8, 1948, entered a "final judgment" as to title and fixing the value of the property at $156,087.50 (R. 122-125). The United States appealed from both the order of October 27, 1947, and the judgment of January 8, 1948. Respondents appealed from the judgment of January 8, 1948, claiming a greater title than that awarded to them by the trial court and also claiming errors in the valuation proceedings. No question is presented by the United States with regard to the valuation proceedings except that in the event it is ultimately determined that respondents' title differs from that found to exist by the trial court, the judgment fixing the value of the property would, of course, have to be reversed to permit the trial court to determine the value of the title, if any, actually outstanding.

1. a. Although correctly holding that by the Act of December 19, 1791 (Md. Laws 1791, c. 45, D. C. Code (1940), p. xxviii)—which ratified the cession of that part of the District of Columbia which formerly lay in Maryland—the State ceded the bed of the Anacostia River to the United States, the courts below have established the continuing right of riparian owners to acquire the title of the United States to that bed by wharfing and filling.[7] Despite the established principle that the sovereign can be divested of its title to lands under navigable waters only upon express terms and that, under the Constitution, property belonging to the United States can be disposed of only upon specific authority of Congress (*Morris* v. *United States,* 174 U. S. 196, 232-237; *Shively* v. *Bowlby,* 152 U. S. 1, 13, 48, 58; *Mar-*

[7] Following the same chain of title, this Court has on more than one occasion held that the United States became vested with title to the lands underlying the Potomac River by the cession from Maryland. *Morris* v. *United States,* 174 U.S. 196, 226-230, 246; *Marine Ry. Co.* v. *United States,* 257 U.S. 47, 63; *United States* v. *Dern,* 289 U.S. 352, 354.

The trial court here likewise held that title to the soil below high-water mark in the Anacostia River vested in the United States by the cession (R. 105-107). Accordingly, its judgment awarded title to the United States to that part of the bed of the river which lies below the present high-water mark "subject to the riparian rights of defendants" (R. 125). This part of the judgment was affirmed by the Court of Appeals, with a statement (R. 737, fn. 1) that it was not to be interpreted as limited by the trial court's conclusion III that "the United States * * * has no right, title or interest in any of the lands in Square East of [664] nor in the wharf projecting from that square." However, the judgment awards title to the filled-in land to respondents, thus decreeing that the title of the United States to that portion of the river bed (which title the Government acquired on cession) has been divested by virtue of the exercise of the alleged riparian rights.

tin v. *Waddell,* 16 Pet. 367, 411; *Sioux Tribe* v. *United States,* 316 U. S. 317, 326; *United States* v. *San Francisco,* 310 U. S. 16, 29-30; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404-405; Const. Art. 4, sec. 3, cl. 2; see also Const. Art 1, sec. 8; cf. *Northern Pacific R. Co.* v. *United States,* 330 U. S. 248, 257), the opinions below (R. 107-111; 737-8) do not rely upon any express grant of rights in, or title to, the river bed, nor upon any statute conferring title to land in the river bed upon riparian owners—and it is clear that no such grant or legislation exists. Cf. *Morris* v. *United States,* 174 U. S. 196, 282, 284-286. On the contrary, Congress has acted more than once to protect the Government's title to the bed of the Potomac and Anacostia Rivers, and has even repealed legislation that would have resulted in a grant of a portion of the bed of the Anacostia. Act of April 27, 1912, 37 Stat. 93; S. Doc. No. 19, 62d Cong., 1st sess., pp. 25, 33-38; S. Doc. No. 462, 61st Cong., 2d Sess.; Act of August 23, 1912, 37 Stat. 358; cf. *Morris* v. *United States,* 174 U. S. 196, 241-243.[8] It is equally plain,

[8] The trial court referred to the establishment of harbor lines by the Secretary of War under the River and Harbor Act of March 3, 1899, sec. 11, 30 Stat. 1151, 33 U.S.C. 404, as operating "as a license or invitation" to fill or wharf out to those lines (R. 110-111). The River and Harbor Act is merely an exercise of the general power of Congress over navigable waters. In the District of Columbia, the United States not only has its usual power to control navigation, but also has proprietary powers over the lands lying under water. *United States* v. *Dern,* 289 U.S. 352, 354. Clearly, authority given the Secretary of War to control navigation cannot, and does not, authorize the granting of proprietary rights in lands under water.

and the lower courts do not deny, that Congress never adopted or confirmed any prior Maryland law giving riparian owners a right to wharf and fill into a navigable stream and thereby acquire title, and that nothing in the Maryland or Congressional legislation at the time of cession effected such an adoption. See *Morris* v. *United States,* 174 U. S. 196, 282, 240-241; *Shoemaker* v. *United States,* 147 U. S. 282, fn. 1, pp. 307-314, at pp. 313-314 (see fn. 10, *infra,* p. 16).

b. The sole support of the court below for the judgment divesting the United States of its title to part of the Anacostia's bed, in derogation of the long accepted rule, is its own *obiter dictum* in *United States* v. *Belt,* 142 F. 2d 761, 767 (R. 738). That *dictum* rested, in turn, only on a *dictum* in *Baltimore & O. R. R. Co.* v. *Chase,* 43 Md. 23, 35, that under the Maryland common law a riparian owner "has the right of access to the navigable part of the river from the front of his lot, and the right to make a landing, wharf or pier for his own use, or for the use of the public, subject to such general rules and regulations as the Legislature may think proper to prescribe for the protection of the rights of the public * * *."

We show below that this statement does not properly reflect Maryland common law (*infra,* pp.16-18). But, even on its face, the *Chase* case does not purport to state that title to the bed of the navigable stream passes from the state to the riparian

owner upon exercise of the described riparian rights. There is a fundamental difference between a riparian right of access to navigable waters and a right to acquire title to the bed of the river by exercising that right. Cf. *United States* v. *Turner,* 175 F. 2d 644, 647 (C. A. 5), certiorari denied, 338 U. S. 851; *City of Mobile* v. *Sullivan Timber Co.,* 129 Fed. 298 (C. A. 5); see also *Shively* v. *Bowlby,* 152 U. S. 1, 14. And whatever riparian power or privilege of filling or wharfing might have existed under Maryland law, before the cession to the United States, it was not—prior to the filling or wharfing—a right of property in the river bed to which the state held title. The Court of Appeals has itself recognized, in another case involving land on the Potomac River, that a riparian right to occupy land below high-water mark with wharves or other improvements rises to the dignity of a vested property right in the stream only when the title of the riparian owner extends to the bed of the stream. *United States* v. *Hurley,* 63 F. 2d 137, 139 (C. A. D. C.), affirmed on other grounds *sub nom. United States* v. *Dern,* 289 U. S. 352. As the *Chase* dictum itself confirms (43 Md. at pp. 35-36), riparian rights of the type claimed here were always subject to change or abolition by the state legislature. See also *Cahill* v. *Baltimore,* 173 Md. 450, 457; *Classen* v. *Chesapeake Guano Co.,* 81 Md. 258; *Giraud's Lessee* v. *Hughes,* 1 Gill & Johns. 249, 265; cf. *Barney* v. *Keokuk,* 94 U. S. 324, 338.

In the light of the strict necessity for express Congressional sanction of any disposition of Government-owned land, we believe that a riparian privilege of this inchoate character, and with these fundamental limitations, cannot be said to have survived the cession. After 1791, federal land law alone controlled the acquisition of interests in the bed of the Anacostia, and governed the exercise of riparian rights. Whatever power the owner may have had to obtain title to the bed by filling, had Maryland retained title to the river, the acquisition of ownership by the United States cut off that potentiality and substituted Congressional grant as the only future means for acquiring title.[9] The United States was now the owner of the river bed, and "the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired." *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404. When the Anacostia bed became a part of the federal domain, this basic rule of federal land law—requiring af-

---

[9] We do not read the *Chase* case (or the opinions of the courts below in the present suit) as suggesting that these alleged riparian rights would be "vested" in 1791, prior to actual filling or wharfing by respondents or their predecessors, but in any event this Court is free to decide for itself whether such inchoate rights were so fixed, at that time, that the established rules of federal land law could not thereafter be validly applied. Cf. *United States* v. *Waddill Co.,* 323 U.S. 353, 356-357.

firmative legislative permission for acquisition of rights in United States lands—necessarily took the place of the claimed Maryland rule that the right to obtain ownership by filling could continue to be exercised until the state legislature acted to abolish the right. See *supra,* p. 14; *infra,* pp. 18-19. To hold otherwise, as the lower courts have done, is *pro tanto* to disregard the Constitutional power and rights of Congress, and to permit Maryland land rules to govern the disposition of, and to create interests in, wholly federal property.[10]

2. Furthermore, it is submitted that the courts below erred in interpretation of the law of Maryland as to the rights of riparian owners on navigable streams. It is settled by a long line of decisions in that state that no right in a riparian owner to wharf or fill below the high-water mark is recognized in the absence of legislation specifically authorizing it.[11] The statement in *Balti-*

---

[10] This Court has already held that, after Maryland's cession of the lands included in the District, the Maryland land laws were not continued in effect so as to permit the patenting of land in the bed of the Potomac River. *Morris* v. *United States,* 174 U.S. 196, 240-243; see also *Shoemaker* v. *United States,* 147 U.S. 282, fn. 1, pp. 307-314, at pp. 313-314.

[11] See *Casey's Lessee* v. *Inloes,* 1 Gill 430, 497-501, 511-512 (Md. 1844); *Wilson* v. *Inloes,* 6 Gill 121, 169 (Md. 1847); *Giraud's Lessee* v. *Hughes,* 1 Gill & Johns. 249, 265 (Md. 1829); *Baltimore* v. *McKim,* 3 Bland. 453, 466 (Md. 1831); *Wilson's Lessee* v. *Inloes,* 11 Gill & Johns. 351 (Md. 1840); *Hammond's Lessee* v. *Inloes,* 4 Md. 138 (1853); *Day* v. *Day,* 22 Md. 530, 537 (1865); *Goodsell* v. *Lawson,* 42 Md. 348, 362-363 (1875); *Horner* v. *Pleasants,* 66 Md. 475, 477, 7 Atl. 691 (1887); *Sollers* v. *Sollers,* 77 Md. 148, 151-152, 26 Atl. 188 (1893); *Tome Institute* v. *Crothers,* 87 Md. 569, 584, 40 Atl. 261 (1898); *Cahill* v. *Baltimore,* 173 Md. 450, 455,

more & Ohio R. Co. v. *Chase,* 43 Md. 23, 35, that, as a principle of common law, a riparian owner on a navigable stream has "the right to make a landing, wharf or pier," is not only *dictum,*[12] but it stands alone and is contrary to a long line of Maryland cases decided both before and since. Indeed, one of the cases relied upon by the petitioners in *United States* v. *Dern,* 289 U. S. 352, 355, as establishing a common-law right to build and maintain a wharf or other structure below high-water mark on the Potomac River, was *Baltimore & Ohio R. Co.* v. *Chase, supra.* While holding against the petitioners in that case for other reasons, and neither discussing nor deciding the point, this Court expressed doubt (p. 357) that such a right existed "in the absence of a legislative grant either by Maryland before the cession or by the United

196 Atl. 305 (1938). The foregoing cases all arose under specific statutes granting the right to fill or wharf to riparian owners and all recognize that, but for the statute, there would be no right to fill or wharf. From early times, Maryland has conferred certain rights on riparian owners. But in each instance it has been by special acts of the legislature specifically granting defined rights under specific limitations at specified localities.

[12] The question of riparian rights dealt with in that case arose in the City of Baltimore where such rights have been governed by specific statutes since 1745. The decision turned entirely upon the Maryland Act of 1745, c. 9, sec. 10. Moreover, the statement there with reference to the common-law rule was not based on the precedent of Maryland decisions, but primarily on certain decisions of this Court, which were analyzed at length in *Shively* v. *Bowlby,* 152 U.S. 1, 36-40, where it was pointed out that, despite a contrary contention, those cases laid down no general common-law rule as to riparian rights on a navigable stream independent of the law of the particular state involved.

States after it," referring to several of the Maryland cases cited *supra,* pp. 16-17, fn. 11. The trial court in the *Dern* case had held that, under the law of Maryland as it existed in 1801, riparian owners on navigable streams had no vested right to erect a wharf, distinguishing the *Chase* case (*United States ex rel. Greathouse* v. *Hurley,* 60 W. L. R. 162), and the Court of Appeals for the District of Columbia had affirmed its holding (63 F. 2d 137). This decision was not referred to in either the *Belt* opinion or in the instant case.

3. The decision of the court below does not limit respondents' rights to land filled or improvements made prior to judgment (approximately half of which was made since 1926, long after this suit was filed; see fn. 5, *supra*), but apparently confers upon them, and upon other riparian owners of land, the right to acquire title in the future by making improvements below high-water mark. Although the judgment of the district court, affirmed by the Court of Appeals, determined title to land under water between the present high-water mark and the line of maximum depth of the river to be in the United States, it was held to be "subject to the riparian rights of defendants" (R. 125; 737). And there is no limitation or reservation of power in Congress to change the nature of riparian rights, not already exercised by wharfing or filling, without compensation. But, as this Court indicated in *United States* v. *Dern,* 289 U. S.

352, 358, whatever the nature of the riparian rights, they would in any case be subordinate to the power of the United States, in its capacity as proprietor and sovereign, to devote the river bed to a public purpose. Even *Baltimore & Ohio R. R. Co.* v. *Chase,* 43 Md. 23, relied upon by the court below, recognized the power of the state to change or modify riparian rights. See also *Cahill* v. *Baltimore,* 173 Md. 450, 457; *Classen* v. *Chesapeake Guano Co.,* 81 Md. 258; *Giraud's Lessee* v. *Hughes,* 1 Gill & Johns. 249, 265; cf. *Barney* v. *Keokuk,* 94 U. S. 324, 338. See *supra,* p. 14. Specific recognition of this Congressional power should have been included in the judgment.

4. Moreover, if it should be thought that the court below was correct in its ruling as to the nature and extent of respondents' riparian rights, the rights accorded respondents as riparian owners should also be accorded the United States as fee owner of the land in South Capitol Street. *Potomac Steamboat Co.* v. *Upper Pot. S. Co.,* 109 U. S. 672, 680-682, 684; *New Orleans* v. *United States,* 10 Pet. 662, 717; *Richardson* v. *Boston,* 19 How. 263, 269. Since, in our view, the decision below is based upon a nonexistent rule regarding riparian rights in Maryland, there is some difficulty in ascertaining what the ruling in that state would be in the present situation where, because of the curvature of the river bank, the exercise of riparian rights by one owner for the full width of his prop-

erty between parallel lines would interfere with a similar exercise of riparian rights by another owner. The Court of Appeals agreed with the conclusion of the district court that the United States had no such rights with respect to South Capitol Street because "Such rights would cut across and destroy the riparian rights of the appellees" (R. 738). Whatever the rule to be applied in reconciling riparian rights of conflicting owners upon a curve of the river, certainly the award of rights to one owner to the exclusion of all others is not warranted. Cf. *Johnston* v. *Jones,* 1 Black 209, 222-223; *Stull* v. *United States,* 61 F. 2d 826, 829 (C. A. 8); *Cramer* v. *Perine,* 251 N. Y. 177, 184-189.[13]

5. The question whether the United States may be deprived of title to property owned by it, absent express authority of Congress, is one of great importance. The decision of the court below is, as we have shown, in conflict with principles long established by this Court, and it bears directly upon the relation of private riparian ownership to all federal lands underlying bodies of water, wherever located. Riparian rights of the type claimed here should be governed by federal law; the courts below have improperly applied state rules.

---

[13] The district court possibly expressed an alternative ground based upon the intention of the founders of the city that South Capitol Street terminate at the north line of S Street (R. 116). The United States challenged this finding upon appeal and the Court of Appeals did not pass upon this question. We do not believe that the evidence warrants a conclusion that South Capitol Street could be cut off from the river by the exercise of riparian rights.

Moreover, the more local question whether, as the court below has here held, owners of land riparian to the Anacostia or Potomac Rivers may acquire title to land in the bed of those streams by wharfing and filling-out should be definitively determined by this Court. In fact, the Congress in enacting special legislation authorizing the institution of suits like the instant case deemed the question of the Government's title to lands under and adjacent to the rivers of the District of Columbia to be sufficiently important to make review by this Court a matter of right upon direct appeal from the trial court. See Act of April 27, 1912, sec. 5, 37 Stat. 93, 94. The repeal of this provision for direct review by the blanket repeal in the Judiciary Act of 1925 of all acts "inconsistent therewith" (*United States* v. *Belt,* 319 U. S. 521) does not controvert the importance attached by Congress to the questions here involved. The asserted right to acquire title to the river bed by future filling in of lands under water would apparently apply not only to the Anacostia River but also to all of the waterfront of the Potomac River, except in so far as it is ruled by *Morris* v. *United States,* 174 U. S. 196, and will probably have a substantial bearing upon further waterfront development and other improvements in the District of Columbia, such as bridges and tunnels.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 879925 943

INDEX

	PAGE
Introductory	1
Addition to Petitioner's Statement	2
Argument	2
Conclusion	4

Citations

Cases:

B. & O. R. R. v. Chase, 43 Md. 23	4
United States v. Belt, 79 U. S. App. 87, 92 & 93	3

Statutes:

D. C. Code 1940 Ed. p. XXIX (Sec. 2 of the Maryland Act of Cession of 1791)	2
D. C. Code 1940 Ed. Sec. 49-301	3

In The

Supreme Court of the United States

October Term, 1949

No. 712

United States of America,
Petitioner,

v.

Lottie May Martin, James Martin, and
The Smoot Sand & Gravel Corporation

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

OPPOSING BRIEF OF RESPONDENTS

INTRODUCTORY

Some argument of the merits is made by petitioner and it is a temptation to respondents to answer all of it here. However, they will attempt to confine themselves to points which seem material to the question of whether the writ should be granted and its scope.

ADDITIONS TO PETITIONER'S STATEMENT

1. Section 2 of the Act of Cession of 1791 of the State of Maryland to the United States provided:

> "That nothing herein contained shall be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein otherwise than the same shall or may be transferred by such individuals to the United States."
> (D. C. Code, 1940 Edition, p. XXIX)

2. The division of land in the Federal District was accomplished by conveying the land to trustees by deeds in trust to lay out the city, convey the streets to the Commissioners of Public Buildings and grounds and reconvey one-half of the quantity by allotment to the original proprietors (R 66-67 Pars. 9 b & c).

3. There is no dispute about the fact that the entire title to the lands involved in this action with all appurtenant rights vested in the Trustees under said deeds in trust and in said Commissioners for the division of the lots among the original proprietors (R 67 par. 10(a)).

4. It is also agreed by all parties that the lots in Square E of 664 were acquired with riparian rights (R 74, par 20(c), 80, par. I and 117, pars. 10 and I).

ARGUMENT

I.(a) The United States never acquired the land or rights of respondents. Inasmuch as it was agreed that title to all the lands in question vested in the Commissioners through the deeds in trust it cannot be disputed that the United States and the respondents are claiming through a common source of title.

(b) The government's claim that the Maryland Act of Cession gave title to the United States is clearly without foundation because of the provision of that Act quoted above.

In *United States* v. *Belt,* 79 U. S. App. 87 at pp. 92 and 93 the Court of Appeals said:—

> "If by this we are to understand that counsel mean that by cession from Maryland the United States acquired title to all the land embraced within the Cession, such a contention would be manifestly untenable, for it is specifically declared in the Act of Ratification that nothing therein contained shall be construed to vest in the United States any right of property in the soil or affect the rights of individuals therein otherwise than the same may be transferred by such individuals to the United States. If on the other hand, counsel mean only that as to the portion of the land below high water, the United States, under the cession from Maryland and by virtue of the powers surrendered by the States under the Constitution, may exercise their discretion in the use thereof in the public right of fishing, or in the promotion of commerce and navigation, there would be no dissent, for that principle is too firmly established to be questioned."

This opinion was by Chief Justice Groner, a recognized authority on riparian rights, who was recently appointed by this Court as special master in a case involving such rights.

(c) Consequently the United States never acquired the land or rights of respondents and the questions and arguments of petitioner in connection with the right to divest the United States of title are not in point.

II. (a) The common law of Maryland remained in force in the District of Columbia after the cession, D. C. Code (1940) T 49-301.

(b) The United States acquired all the streets and one-half of the land in the city by the deeds in trust mentioned above. The rights respondents acquired under those same deeds in trust in 1794 were vested at that time and could not subsequently be taken from them either morally or legally.

III. (a) The purely local question of whether or not South Capital Street acquired riparian rights in the division of the city in the 1790's was a question of fact. The District Court found as a fact that the founders of the city intended to lay out Square E of 664 in a manner which would preserve to the lot owners their riparian rights; that the founders also intended that the lot owners in that square should receive conveyances of new water lots with no street intervening between their lots and the channel; that South Capital Street terminated at the North line of S Street and did not bound the Square on the East, nor cut off any riparian rights of lot owners in the Square; and that these intents and purposes were carried out and no riparian rights became appurtenant to South Capital Street (R 115 & 116 Par. 7). This finding was amply supported by the evidence (Def's Exhibits 15, 16 & 35; R 191, 192, 207, 321-324 Vol. IV & brown envelope).

(b) This finding was also in accordance with law. *B&O RR* v. *Chase,* 43 Md. 23 arose as a controversy between two lot holders on Baltimore harbor where there was a turn leaving the water ends of the lots at right angles with each other. Since the access of each was inconsistent with the other, the question of which had riparian rights arose. The Court decided that the grantee who received the first patent from the State had the right of access.

CONCLUSION

It would be a waste of time to grant a writ to review the question of whether or not the United States can be *divested* of its title to the bed of the Rivers in the District of Columbia as this question is not involved. The same applies to the question of whether the United States acquired riparian rights with South Capital Street as that is a question of fact and not appealable. If any writ be granted upon this petition it should be only to review the

questions of whether or not the Courts below correctly construed the laws of Maryland and whether or not respondents riparian rights could be taken by the United States for public purposes without compensation.

Respectfully submitted,

DANIEL PARTRIDGE, III
MILTON D. CAMPBELL
Counsel for Lottie May Martin, James Martin and The Smoot Sand & Gravel Corporation, Respondents.

FILE COPY

Office - Supreme Court, U.
FILED
MAR 29 1950
CHARLES ELMORE CROPL
CLER

IN THE

Supreme Court of the United States

October Term, 1949

No. 715

JAMES MARTIN, LOTTIE MAY MARTIN, and THE SMOOT SAND AND GRAVEL CORPORATION, *Petitioners,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL PARTRIDGE III
American Security Bldg.
Washington, D. C.

MILTON D. CAMPBELL
Woodward Bldg.
Washington, D. C.
Attorneys for Petitioners

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

CONTENTS

PAGE

Introduction 1

Opinions Below 2

Jurisdiction 2

Summary Statement of the Matter Involved..... 2

Questions Presented 8

Reasons for Granting the Writ 10

1. The Question of Respondents' Right to Compensation for Their Filled Land Under the Constitution Is of General Importance and Should Be Settled 10

   The Court of Appeals did not give proper effect to the Greenleaf-Johnson Lumber Company and the Chicago Milwaukee St. P. & P. cases 12

2. Other Questions of General Importance Were Incorrectly Decided When the District Court Held That the Government as a Matter of Law Had a Proprietary Title to the Land Underlying the Potomac and Rejected Defendants' Evidence of Title to the Channel, Subject to the Public Rights of Fishery and Navigation 15

3. Another Important Question Involves the Construction of the Federal Statute of 1912.... 17

4. There Is Also an Important Question Here as to Whether the Modern Tendency of the Circuit Courts of Appeal to Shorten Their Opinions Has Gone Too Far 18

Conclusion 19

Appendix 20

CASES

Appleby v. New York, 271 U. S. 364, 46 S. Ct. 569, 70 L. Ed. 992 16

Bishop Co. v. Curran, et al., 30 R. I. 504 11

PAGE

Boston v. LeCraw, 17 How. 426, 15 L. Ed. 118 11
Brown v. Kennedy, 5 H & J 195 (156) 12
Carli v. Stillwater Ry. Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290 12
C & D Canal v. U. S., 233 Fed. 926 17
Dawson v. Broome, 24 R. I. 359 11
D. C. v. Cropley, 23 App. D. C. 232 16
Dutton v. Strong, 1 Black 23, 17 L. Ed. 29 11
Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251, 35 S. Ct. 551, 59 L. Ed. 939 ..... 12, 13
Guaranty Trust Co. v. U. S., 304 U. S. 126, 58 S. Ct. 785, 82 L. Ed. 1224 17
Heiney v. Nolan, 67 A. 1008, 75 N. J. Law 397 12
Illinois Central R. Co. v. Ill., 146 U. S. 387, 36 L. Ed. 1018 ..... 11, 15
Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 33 S. Ct. 679, 57 L. Ed. 1083 16
Lockwood v. N. Y. & N. H. R. Co., 37 Conn. 387 12
Matter of New York, 217 N. Y. 1 12
Miller v. Mendenhall, 43 Minn. 95, 44 N. W. 1141, 19 Am. St. Rep. 219, 8 L. R. A. 89 12
Monongahela Navigation Co. v. U. S., 148 U. S. 312, 37 L. Ed. 463 13
Nickols v. Lewis, 15 Conn. 139 12
Peo. v. Cal. Fish Co., 166 Cal. 576, 138 P. 79 12
Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. Ed. 570, 32 S. Ct. 340 ..... 14, 16
Portsmouth Co. v. U. S., 260 U. S. 327, 43 S. Ct. 135, 67 L. Ed. 287 18
Potomac Steamboat Co. v. Upper S. B. Co., 109 U. S. 672, 3 S. Ct. 445, 4 S. Ct. 15, 27 L. Ed. 1070 11
Scranton v. Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. Ed. 126 15
Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331 15
Smoot Sand & Gravel Corp. v. Washington Airport, 283 U. S. 348, 51 S. Ct. 474, 75 L. Ed. 1109 15
Union Dept. Co. v. Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. R. 789 12
U. S. v. Belt, 47 F. Supp. 239 17
Same, 79 U. S. App. D. C. 87, 142 F. (2d) 761 ..... 3, 4, 11, 14
U. S. v. Cansby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 18

PAGE

U. S. v. Chandler-Dunbar Co., 229 U. S. 53, 33 S. Ct. 667, 57 L. Ed. 1063 16
U. S. v. Chaves, 159 U. S. 452, 16 S. Ct. 57, 40 L. Ed. 215 17
U. S. v. Chavez, 175 U. S. 509, 44 L. Ed. 255, 20 S. Ct. 159 17
U. S. v. Chicago, Milwaukee, St. Paul and Pacific R. R. Co., 61 S. Ct. 772, 312 U. S. 592, 85 L. Ed. 1064 12
U. S. v. Fullard Leo, et al., 133 F. (2d) 743, aff. 331 U. S. 256, 67 S. Ct. 1287, 91 L. Ed. 1474 17
U. S. v. Groen, et al., 72 Fed. Supp. 713 2
U. S. v. Martin, et al., 177 F. (2d) 733 2
U. S. v. Maxwell Land Grant Co., 121 U. S. 325, 7 S. Ct. 1015, 30 L. Ed. 949 17
U. S. v. Morris, 174 U. S. 196, 43 L. Ed. 946 3
U. S. v. River Rouge Co., 269 U. S. 411, 70 L. Ed. 339, 46 S. Ct. 144 11
U. S. v. Stinson, 197 U. S. 200, 49 L. Ed. 724, 25 S. Ct. 426 17
Yates v. Milwaukee, 77 U. S. (10 Wall.) 497, 19 L. Ed. 984 11

STATUTES

Act of 1912 authorizing this suit, 37 Stat. 93..... 7, 9, Appendix
Judiciary and Judicial Procedure, 28 U. S. C. 1254(1).. 2
Maryland Act Ratifying Cession, 1791, D. C. Code, 1940 Ed., p. XXIX, Sec. 2 4
Same, Sec. 3 6
Maryland Act of 1793, D. C. Code, 1940 ed., p. XXXI, Sec. 1 6
Rivers and Harbors Act of March 3, 1899, T. 33, U. S. C. A., Sec. 404 ..... 5, 10, 13, 19

In The

Supreme Court of the United States

October Term, 1949

No.

James Martin, Lottie May Martin, and The Smoot Sand and Gravel Corporation, *Petitioners,*

v.

United States of America.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, James Martin, Lottie May Martin and the Smoot Sand and Gravel Corporation, a corporation, acting by and through their attorneys, Daniel Partridge III and Milton D. Campbell, respectfully pray for a writ of certiorari directed to the United States Court of Appeals for the District of Columbia Circuit to review those

portions of the decision and judgment of that Court in the consolidated cases of *United States of America, Appellant* v. *James Martin, et al.*, and *Martin, et al.* v. *the United States,* numbered 9781 and 9782 in said Court, and dated October 31, 1949, which held that the reclaimed land of petitioners (defendants) could be taken by the United States for purposes of navigation without compensation under the Fifth Amendment, that there was no error involved in the valuation hearing held in this case, and which affirmed paragraphs eight (8) and eleven (11) of the Final Judgment of the United States District Court for the District of Columbia (R. 124 and 125) and to review said paragraphs of said Final Judgment.

Opinions Below

The opinion of the District Court (R. 97) is reported in *United States* v. *Groen, et al.,* 72 Fed. Supp. 713. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 736-738) is reported at 177 F. (2d) 733.

Jurisdiction

The judgment of the Court of Appeals was rendered on October 31, 1949 (R. 739). By order of the Chief Justice, dated January 25, 1950, the time for filing this petition was extended to March 30, 1950 (R. 741). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Summary Statement of the Matter Involved

1. The United States (sometimes called plaintiff in this petition), filed the instant suit in 1913 in the form of a bill in equity claiming a fee simple title to all the land in Square E of 664, in the District of Columbia. This square

lies at the foot of South Capitol Street on the Anacostia or Eastern Branch of the Potomac River. The Dermott map made about 1795 (R. brown envelope and Vol. V, Ex. 16) shows the square on a small scale and Plfs. T-35 Vol. V is a plat of the square on a large scale as it was in 1929. The United States claimed title by this bill to quiet title in the same way a private person would do. (R. 2-8) Petitioners Lottie May Martin, et al. (sometimes called defendants in this petition), answered denying the claim of the United States to title and claiming title in themselves (R. 9-28, 56-58).

2. The historical background of the City of Washington is recited in the case of *United States* v. *Rigel O. Belt,* 79 U. S. Appeals D. C. 87, 142 F. (2d) 761, which involved Square E of 666, the square next to Square E of 664 and in greater detail in the majority opinion in *United States* v. *Morris,* 174 U. S. 196, 43 L. Ed. 946, and the dissenting opinion in that case beginning at 174 U. S. 291, 43 L. Ed. 980. It will be seen that the transfer of the land in the District of Columbia was accomplished by conveyances by the original proprietors in trust to lay out the City, convey the streets to Commissioners of Public Buildings and Grounds appointed by President Washington, for the use of the United States and divide the lots between the United States and the original proprietors, who received part of their land back as their only compensation for the conveyances. Many of the lots received by the United States were sold to provide money for the public buildings. The transfer of the new lots to the original proprietors and the purchases of the lots sold was accomplished through these Commissioners. The Commissioners transferred by allotments which were given the force and effect of conveyances. Maryland in 1791 ceded its interest in the District of Columbia to the United States, by the Act of Cession, but Maryland was careful not to transfer any rights which would prejudice the pri-

vate property rights of citizens of the District. Section 2 of that Act read in part as follows:

> "*Provided,* That nothing herein contained shall be so construed as to vest in the United States any right of property in the soil as to affect the rights of individuals therein otherwise than the same shall or may be transferred by such individuals to the United States."

(D. C. Code, 1940 Edition,[1] p. XXIX) Construed in *United States* v. *Rigel O. Belt, supra,* 79 U. S. App. D. C. at pp. 92 and 93.

3. The Deeds in Trust after providing for the conveyance of the streets provided in part:

> "that one-half the quantity of the said lots, pieces and parcels hereby bargained and sold shall be assigned and conveyed as near the old situations as may be to" (the original proprietor who was the grantor) "in fee simple, so that he shall have made up to him one-half of his former quantity and in as good a situation, * * *"

and went on to say that if one-half of the original proprietor's quantity could not be assigned to him in like situation to his old lots then he should receive other ground in the City by agreement between him and the Commissioners and if the original proprietor and the Commissioners should disagree then the original proprietor should receive full compensation in money. The Deeds in Trust contained the usual provisions of such deeds including the provision that all parties would execute any further deeds to carry out its true intent. (R. 66-67, see pars. 9 (b) and (c), 462-483).

4. The entire title to the lands involved in this action with all appurtenant rights vested through these deeds in trust in the Commissioners appointed by President

---

[1] All references to the D. C. Code herein are to the 1940 edition.

Washington pursuant to Act of Congress for the purpose of laying out the City and for the division of the lots with the original proprietors (R. 67, par. 10(a). Consequently plaintiff and defendants claim through a common source of title.

5. These lots in Square E of 664 were allotted in exchange for lots formerly in the little town of Carrollsburg. The Carrollsburg lots had riparian rights and had been conveyed to the trustees under the above-mentioned deeds in trust. The United States concedes that respondents' predecessors in title received their lots in Square E of 664 with riparian rights (R. 74, par. 20(c), 80, 117).

6. Defendants' riparian rights were, however, subject to the control of the Congress over the river for purposes of navigation. In the exercise of this control the Congress delegated to the Secretary of War the power to establish harbor lines by the Rivers and Harbors Act of March 3, 1899 (T. 33, U. S. C. A. Sec. 404). He marked the banks of the river by a bulkhead line which runs in front of Square E of 664 (R. Vol. V, Ex. T-20 and Vol. IV, Ex. 18). This line defines the limit to which the riparian owners may fill without a permit (Said Ex. 18 and R. 357, 358, 362, 364-366). The river between high water mark and the channel was too shallow to be navigable in fact and the owners filled to the bulkhead line (R. 232 and 233). The District Court visited the property before rendering its opinion and it was then apparent that the entire water front in the vicinity was filled substantially to the bulkhead line (R. Vol. V Plfs. Ex. 2 and Vol. IV Defs. Ex. I-4).

7. The District Court held that these riparian rights included the right of access to the channel of the river and the right to improve that access by filling and wharfing (R. 108-110); that the establishment of the bulkhead line operated as a license or invitation to fill out to that line (R. 110 and 111); that when defendants accepted this invitation they acquired fee simple ownership of the re-

claimed land (R. 122), which could only be taken away for public purposes, upon due process of law and with just compensation (R. 113). The Court of Appeals affirmed, except as to the just compensation. That Court held that the Government could take the reclaimed land for purposes of navigation without compensation to its owners.

8. Lots 1 to 8, inclusive, Square E of 664 were allotted by the Commissioners to defendants' progenitors in title (R. 38, 39 & 73, par. 18(a), 96 & 97) by lot and square number (R. 181-183). The allotments were given the force and effect of reconveyances under the Deeds in Trust above mentioned by Section 3 of the Maryland Act Ratifying Cession of 1791 (D. C. Code, p. XXIX) and Section 1 of the Maryland Act of 1793 (D. C. Code, p. XXXI).

9. Defendants and their predecessors in title have been in possession of the land as long as the memory of living man (R. 160, 230, 234, 378, 447, 448, 485, 492, Vol. V, Plfs. Ex. T-39). There was no evidence that the Government had ever been in possession. The District Court rejected deeds describing lots 7 and 8 as extending to the channel of the River dated in 1802 and 1863 (R. 440-447) offered as evidence of possession, which recited substantial consideration, and rejected tax certificates showing real estate taxes to be paid (R. 438-452) and rejected other evidence of possession (R. 51, 230), and held that the burden of proof was on the defendants. Defendants attacked this ruling in a cross-appeal, but the Court of Appeals ignored that attack.

10. Early maps show the lines of the lots extending well past the high water line in 1794 (R. Vol. V, Ex. 5, Vol. IV, Exs. 12 and 16). Early records of the Commissioners' Office dated in the 1790's produced from the National Archives of the United States describing the lots as extending to the channel were rejected by the District Court though their authenticity was admitted (R. 139, 140) and there was evidence of the Commission-

ers' direction to prepare some of them (R. 218). These records included original plats and certificates of the early surveyors platting the lots to the channel and certifying that they extended to the channel. (R. Vol. IV, Exs. 25, 27, 30, 31, 32, 33, 34). One certificate of a surveyor was that the lot lines extended to the channel as appears from the original plans and proceedings in the Commissioners' Office dated June 26, 1794 (R. Vol. IV, Ex. 30) and that is the date of the recorded allotment describing the lots only by lot and square number (R. 181-183).

11. The statute of 1912 authorizing the filing of the suit is annexed hereto as an Appendix. Plaintiff contended that the statute required a valuation hearing so that the Congress could appropriate the value found by the Court and acquire the land. Defendants contended that there should be no valuation hearing. The District Court held the valuation hearing and therein rejected evidence offered by defendants of the reproduction value of the wharf (R. 516-520, Vol. IV, Exs. A and B), its fair market value (R. 549-551); that a witness had a bona fide offer for two comparable lots across the street at a price considerably higher than the square foot valuation found by the Court (R. 521-528, 543, 544 and 728-731); of advantages of the property because of its water front location (R. 524 and 525) and the scarcity of privately owned waterfront land in the area (R. 560 and 561); and a map of the waterfront which had been received in evidence at the title hearing offered during argument on the grounds that it had not been offered in evidence at the valuation hearing (R. 702). The District Court also received the following evidence over the objection of defendants: evidence of the sale of comparable properties without any showing of lack of compulsion (R. 582, 583, 620, 621, 623), one seven years before with no adequate evidence of comparability (R. 562-564); hearsay evidence (R. 624 and 625, 715-718); and verbal evidence of a comparable sale without producing the contracts or check (R. 582, 583).

12. Two real estate experts testified for the plaintiff that the property was worth about $169,000 and $176,000 respectively (R. 661, 664, 683, 684, 685). They did not take riparian rights or a very recent sale of the adjoining square into consideration (R. 571, 648-655, 665, 666, 676, 689, 702, 703 and 732). There were well over a hundred linear feet of steel bulkheading in a metal pier on lots 4 and 5 (R. Vol. IV, H and I-4) and one of plaintiff's witnesses testified that the cost of such bulkheading was $400.00 per linear foot (R. 696 and 697). There was no prayer for the valuation in petitioners' bill of complaint (R. 7 & 8). There was no act of taking by the Government, no indication of any kind whether or not the property would be taken and no allegation or proof that it was needed for any public purpose.

13. Three real estate experts testified for defendants to approximate total values ranging from $251,000.00 to $475,000.00 (R. 523, 524, 549-554, 589-592).

14. The District Court found lots 4 and 5 to be worth about $29,000.00 and the remaining lots about $135,000.00 with no allowance at all for the wharf or the steel bulkheading (R. 121-124). This finding in the aggregate was less than the valuation of either one of the plaintiff's witnesses.

15. Defendants attacked the holding and results of the valuation hearing in their cross-appeal and the Court of Appeals ignored their contentions except to say that it found no error in that hearing.

Questions Presented

I. Where the Congress acting through the Secretary of War has defined the bank of a navigable river in the District of Columbia by establishing a bulkhead line and thereby invited defendants to exercise their riparian

rights by filling to that line and defendants have done so can Congress thereafter take the filled land for purposes of navigation without making compensation to its owners under the Fifth Amendment to the Constitution of the United States?

II. (a) Can title to land underlying a navigable river be held by private citizens subject to the public rights of navigation and fishery?

(b) Did the Act of Cession of Maryland of 1791 pass any right to the United States in the soil underlying the Potomac River which affected the rights of individuals therein?

(c) Are the rights of the United States to the navigable Potomac under the Commerce Clause of the Constitution such as to make the evidence of defendants of their possession and that their lots extended to the channel of the Potomac, subject to the public rights in any submerged land, inadmissable?

(d) Was this evidence inadmissable on any grounds?

(e) In this action in which the United States claimed title as a private plaintiff would, was the burden of proof on defendants to show that the action of the Commissioners in allotting to the channel, taken over a century before suit was filed, was authorized, or was there a presumption that they were authorized to act as they did?

(f) Did defendants prove that their lots extended to the channel of the river, subject to the public rights of navigation and fishery in any shallow submerged lands?

III. (a) Did the Courts properly construe the Act of Congress of 1912 when they held that it required a valuation hearing as a part of this cause?

(b) Did the Courts' requirement of a contested valuation hearing and their failure to hold that such hearing did not authorize Congress to take for the value found, violate the Fifth Amendment?

(c) Did the Courts err in rejecting and allowing evidence in the valuation hearing?

Reasons for Granting the Writ

1. THE QUESTION OF RESPONDENTS' RIGHT TO COMPENSATION FOR THEIR FILLED LAND UNDER THE CONSTITUTION IS OF GENERAL IMPORTANCE AND SHOULD BE SETTLED.

The Rivers and Harbors Act of 1899 is national in scope. Throughout the United States there are thousands of acres of land on navigable waters which have been filled with the consent of the States and the United States and improved by billions of dollars worth of warehouses, tanks, and other improvements. In some of the large cities like San Francisco and New York large office buildings have been built on reclaimed land once below the high-water mark of the navigable water. This decision not only casts a cloud on the title of defendants' reclaimed land which decreases its value, but casts the same cloud on all the land of like character in the United States and its possessions.

The decision is also against the public interest and if allowed to stand will hamper commerce and retard the improvement of land on navigable waters. Our waters, unlike those in England, are bordered by thousands of acres of shallow waters and marsh over which the tide ebbs and flows. It facilitates navigation and commerce to acquire access to navigable waters by filling in this type of land. To bulkhead and fill is an expensive process. Many will be unwilling to go to that expense or the expense of building a costly grain elevator or coal bunker on filled land if the Government can take it without compensation.

With this cloud on the title what lender would make a loan secured on filled land on navigable waters.

The decision of the Courts below that defendants' riparian rights included the right of access to the channel is supported by reason, the authorities and by public necessity. Those rights were subject to the regulation of both the State and Federal Governments in the States and the Federal Government in the District of Columbia where the two are as one. When the Secretary of War acting under the authority of Congress to regulate navigation established the bulkhead line here, he in effect said "You riparian owners are entitled to bring your fast land forward to this line. This line is the bank of the river beyond which is the bed of the river and public water. You are invited to fill to the line and are no longer entitled to accretion beyond the line as we will dredge it away." And when these riparian owners accepted that invitation and filled to that line the bank of the river and the fast land were in effect extended both practically and in the eyes of the law.

Many cases support the above, including the following:

United States v. *River Rouge Co.*, 269 U. S. 411, 412, 416-418, 70 L. Ed. 339, 46 S. Ct. 144.

Illinois Central R. Co. v. *Ill.*, 146 U. S. 387, 36 L. Ed. 1018, 1040 and cases cited.

Potomac Steamboat Co. v. *Upper S. B. Co.*, 109 U. S. 672, 686, 3 S. Ct. 445, 4 S. Ct. 15, 27 L. Ed. 1070.

Yates v. *Milwaukee*, 77 U. S. (10 Wall) 497, 19 L. Ed. 984.

Dutton v. *Strong*, 1 Black 23, 17 L. Ed. 29.

Boston v. *LeCraw*, 17 How. 426, 15 L. Ed. 118.

United States v. *Belt*, supra.

Dawson v. *Broome*, 24 R. I. 359, 368.

Bishop Co. v. *Curran, et al*, 30 R. I. 504, 508.

Peo. v. *Cal. Fish Co.,* 166 Cal. 576, 599, 600, 138 P. 79.

Matter of New York, 217 N. Y. 1, 17.

Miller v. *Mendenhall,* 43 Minn. 95, 44 N. W. 1141, 19 Am. St. Rep. 219, 8 L. R. A. 89.

Carli v. *Stillwater Ry. Co.,* 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290.

Brown v. *Kennedy* (High Court of Chancery of Md. 1821), 5 H & J 195 (156), 202.

Nickols v. *Lewis,* 15 Conn. 139 (1870).

Lockwood v. *N. Y. & N. H. R. Co.,* 37 Conn. 387.

Heiney v. *Nolan,* 67A. 1008, 75 N. J. Law 397.

Union Dept. Co. v. *Brunswick,* 31 Minn. 297, 302, 17 N. W. 626, 47 Am. R. 789.

THE COURT OF APPEALS DID NOT GIVE PROPER EFFECT TO THE GREENLEAF-JOHNSON LUMBER COMPANY AND THE CHICAGO MILWAUKEE ST. P. & P. CASES.

In *United States* v. *Chicago Milwaukee, St. Paul and Pacific R. R. Co.,* 61 S. Ct. 772, 312 U. S. 592, 85 L. Ed. 1064, there was no question of rights acquired by filling to a bulkhead line at the invitation of the United States. To improve the navigation of the Mississippi the Government constructed a series of locks and dams which raised the level of the river and damaged the embankment of the railroad. The part of the railroad embankment in question was in the bed of the river between high and low water mark. The United States had not given its consent to the construction of the embankment.

The case of *Greenleaf-Johnson Lumber Co.* v. *Garrison,* 237 U. S. 251, 35 S. Ct. 551, 59 L. Ed. 939, is not in point. The lumber company erected the wharf in question in 1877, long before any harbor lines were established by anyone. The wharf was in the form of two arms which

extended far out into the river, with a line of piles and earth partially closing the space between (see map opposite p. 42 of the record in the case). There was river within the enclosure and on three sides. In 1890 the state established a pierhead line which ran across in front of the wharf and the Secretary of War adopted this line. In 1911 the Secretary of War pursuant to the Rivers and Harbors Act of 1899 fixed the pierhead line 200 feet behind the end of the wharf declaring that the wharf was an obstruction to navigation and that gave rise to the suit. This was no case of extending the fast land to a bulkhead line fixed by the United States, at the invitation of the United States to improve navigation. In the instant case the whole bank of the river along and near defendants' property has been moved by filling and other improvements substantially to the bulkhead line fixed by the Secretary of War to improve navigation and the District Court saw this when he inspected the property. Also see photograph (R. Vol. IV Ex. I-4)

The Court in the Greenleaf-Johnson case distinguished the case of *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 37 L. Ed. 463, on the grounds that the Government had issued an implied invitation to the Monongahela Co. to build the locks and bridge damaged to aid navigation.

The *Monongahela Navigation Co.* case, supra, in which this Court held that the Fifth Amendment compelled compensation, is more in point. There the invitation to improve was a statute of the United States saying that appropriations should not be paid until the Monongahela Co. had finished its lock and dam—an implied invitation. Here there was a clearer invitation to improve. See the language of this Court on pages 324 and 325 of 148 U. S.

It is true that this Court in the *Greenleaf-Johnson* case also mentioned the fact that the improvements of the Monongahela Co. had improved the navigability of the

river, but, as has been heretofore argued, filling in the shallow water of the Potomac to this bulkhead line also improved its navigability. The very purpose for establishing the bulkhead line was to improve navigation.

In the *Belt* case, supra, the District Court held that Belt owned the lots in Square 666 to the highwater line with riparian rights. The United States appealed to the United States Court of Appeals for the District of Columbia. After argument, but before deciding the case, the Court viewed the property. Belt had not exercised his riparian right to fill to the bulkhead line. There was more than 100 feet of water between the shore and the bulkhead line. The Court of Appeals held that those riparian rights were qualified. They were qualified because Belt had not exercised his riparian right to fill. Until the filling was done the Secretary of War could reestablish the bulkhead line in front of his property even as far back as the high water line.

And see *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 56 L. Ed. 570, at p. 632 and 633 where great emphasis was placed on the fact that when the Secretary of War changed his harbor lines he followed the contours of the bank as it was at the time of the change and where this Court said that the public right of navigation follows the course of the stream.

The decisions of State Courts are in support of the decision of the District Court in the instant case to the effect that a riparian owner of land reclaimed at the invitation of the United States is entitled to compensation under the Fifth Amendment. However, defendants submit that the Supreme Court has not decided this question in a case directly in point; and that it is a question which this Court should decide.

2. OTHER QUESTIONS OF GENERAL IMPORTANCE WERE INCORRECTLY DECIDED WHEN THE DISTRICT COURT HELD THAT THE GOVERNMENT AS A MATTER OF LAW HAD A PROPRIETARY TITLE TO THE LAND UNDERLYING THE POTOMAC AND REJECTED DEFENDANTS' EVIDENCE OF TITLE TO THE CHANNEL, SUBJECT TO THE PUBLIC RIGHTS OF FISHERY AND NAVIGATION.

These questions involve the nature of the Government's right in all navigable waters and its rights in all suits in which it asserts proprietary rights as a private person would do.

There is a great deal of confusion among the decisions dealing with the Government's rights in navigable waters between proprietary rights in the soil under the waters and sovereign rights to govern the waters under the Commerce Clause and it is respectfully submitted that the lower Courts were misled by this confusion and that it should be cleared up by this Court. For instance, one of the cases cited by the District Court in support of its opinion that the United States had title to the bed of the Potomac as a rule of property (R. 105 and 106) was *Smoot Sand & Gravel Corporation* v. *Washington Airport,* 283 U. S. 348, 51 S. Ct. 474, 75 L. Ed. 1109, and that case dealt with sovereign rights alone and not with any title of a private nature.

The right of a private person to acquire title to submerged land subject to the public rights of fishery and navigation has been recognized in many carefully considered cases on navigable waters. These cases are too numerous to brief here but include:

Illinois Cent. R. R. v. *Ill.,* supra, 146 U. S. at p. 452.

Shively v. *Bowlby,* 152 U. S. 1, 13, 14 S. Ct. 548, 38 L. Ed. 331.

Scranton v. *Wheeler,* 179 U. S. 141, 163, 21 S. Ct. 48, 45 L. Ed. 126.

Lewis Blue Point Oyster Co. v. *Briggs,* 229 U. S. 82, 88, 33 S. Ct. 679, 57 L. Ed. 1083.

Philadelphia Co. v. *Stimson,* 223 U. S. 605, 624, 32 S. Ct. 340, 56 L. Ed. 570.

U. S. v. *Chandler-Dunbar Co.,* 229 U. S. 53, 60-63, 33 S. Ct. 667, 57 L. Ed. 1063.

Appleby v. *New York* (1925), 271 U. S. 364, 394, 46 S. Ct. 569, 70 L. Ed. 992.

The quotation in our petition from the 1791 Act of Cession of Maryland shows clearly that the United States acquired no rights in the soil as against the rights of private persons, consequently the evidence of the allotment by the Commissioners to the channel should have been received, as defendants are claiming title to the shallow submerged land, subject to the jus publicum, the public rights of fishery and navigation.

The District Court (and in turn the Court of Appeals) also misapplied the case of *D. C.* v. *Cropley,* 23 App. D. C. 232, in holding that the Commissioners had no authority to convey below the high water mark. In that case the Commissioners were acting under an Act of Congress which gave them no right to convey below the high water mark. In the instant case the Commissioners were a different set of Commissioners entirely appointed by George Washington to lay out the City and carry out the provisions of the Deeds in Trust from the original proprietors. These latter Commissioners had all of the authority conveyed by the deeds in trust as well as those accorded by the Acts of Maryland and of Congress.

The Government with all its resources has a tremendous advantage over a private litigant anyway and when it attacked the allotment to the channel made in 1794 the Courts should have held that it had the burden of proof and that there was a presumption that the allotment was

valid and was supported by a prior right in the original proprietor.

Above cases and:

United States v. *Fullard Leo, et al.*, 133 F. (2d) 743, affirmed 331 U. S. 256, 67 S. Ct. 1287, 91 L. Ed. 1474.

Guaranty Trust Co. v. *United States*, 304 U. S. 126 at p. 134, 58 S. Ct. 785, 82 L. Ed. 1224.

United States v. *Stinson*, 197 U. S. 200, 205, 49 L. Ed. 724, 25 S. Ct. 426.

United States v. *Chavez*, 175 U. S. 509, 44 L. Ed. 255, 20 S. Ct. 159.

United States v. *Chaves*, 159 U. S. 452, 16 S. Ct. 57, 40 L. Ed. 215.

United States v. *Maxwell Land Grant Co.*, 121 U. S. 325, 7 S. Ct. 1015, 30 L. Ed. 949.

C & D Canal v. *United States*, 233 Fed. 926.

United States v. *Belt*, 47 F. Supp. 239.

3. ANOTHER IMPORTANT QUESTION INVOLVES THE CONSTRUCTION OF THE FEDERAL STATUTE OF 1912.

To compel a citizen to undergo a contested valuation hearing is to put him to considerable expense in the way of expert witness fees, attorneys fees and costs not recoverable against the Government. For an equity court which should afford complete relief in a title suit to ignore his contention that it is not a condemnation suit and incorporate the values in a final decree (R. 124 par. 8) is to leave him with a cloud on his title which can only be removed after a long time and at considerable expense. Any title company would report this title as subject to the Government's possible right to take it for the value fixed. For many reasons too numerous to go into except in a

hearing on the merits petitioners contend that the valuation hearing should never have been held. These reasons involve the construction of the statute, the construction of acts of Congress of condemnation and repealing acts of condemnation and the contention that the valuation portion of the statute was abandoned by failure to pray for valuation in the bill and allowing it to remain pending from 1912 to 1946, 34 years.

The substantial results of plaintiff's actions and those of the Courts is to take defendants' property without compensation and to deny them the due process of law guaranteed by the Fifth Amendment.

See *United States* v. *Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, and

Portsmouth Co. v. *United States,* 260 U. S. 327, 43 S. Ct. 135, 67 L. Ed. 287.

After defendants' property had been tied up for thirty-four years the Court in the valuation hearing allowed inadmissable and rejected admissable evidence and found the lowest valuation possible.

4. THERE IS ALSO AN IMPORTANT QUESTION HERE AS TO WHETHER THE MODERN TENDENCY OF THE CIRCUIT COURTS OF APPEAL TO SHORTEN THEIR OPINIONS HAS GONE TOO FAR.

All the above points were made and carefully briefed by defendants in their cross-appeal. The Court of Appeals ignored most of them in its opinion. The important question of the effect of the valuation of defendants' property was an issue necessary to be decided in order to clear up all questions affecting title.

Conclusion

The above questions involving the respective rights of this Government and its citizens to the shores and the lands below navigable waters and the construction and effect of the Rivers and Harbors Act and the Constitution have never been clearly settled by this Court. It is of the utmost importance to the nation that they be settled and that the writ of certiorari be granted.

Respectfully submitted,

DANIEL PARTRIDGE III
American Security Bldg.
Washington, D. C.

MILTON D. CAMPBELL
Woodward Bldg.
Washington, D. C.
Attorneys for Petitioners

March, 1950.

APPENDIX

The Act of April 27, 1912, 37 Stat. 93, provides as follows:

An Act Providing for the protection of the interests of the United States in lands and waters comprising any part of the Potomac River, the Anacostia River or Eastern Branch, and Rock Creek and lands adjacent thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of establishing and making clear the title of the United States it shall be the duty of the Attorney General of the United States to institute as soon as may be, or whenever in his judgment it is deemed proper, a suit or suits in the Supreme Court of the District of Columbia against all persons and corporations, or others, who may have, or pretend to have, any right, title, claim, or interest adverse to the complete title of the United States in and to any part or parcel of the land or water in the District of Columbia in, under, and adjacent to the Potomac River, the Anacostia River or Eastern Branch, and Rock Creek, including the shores and submerged or partly submerged land, as well as the beds of said waterways, and also the upland immediately adjacent thereto, including made lands, flats, and marsh lands.

SEC. 2. That the suit or suits mentioned in the preceding section shall be in the nature of a bill in equity, and there shall be made parties defendant thereto all persons and corporations, or others, known to set up or assert any claim or right to or in the land or water in said preceding section mentioned, and against all other persons and corporations, or others, who may claim to have any such right, title, or interest. On the filing of said bill process shall issue and be served, according to the ordinary course of said court, upon all persons and corporations, or others, within the jurisdiction of said court; in case said land is in actual adverse possession to the United States notice shall be served on the parties in actual possession, and public

notice shall be given, by advertisement in two newspapers published in the city of Washington, for three weeks successively, of the pendency of said suit, and citing all persons and corporations, or others interested in the subject matter of said suit or in the land or water in this Act mentioned, to appear, at a day named in such notice, in said court to answer the said bill and set forth and maintain any right, title, interest, or claim that any person or corporation, or others, may have in the premises; and the court may order such further notice as it shall think fit to any party in interest.

SEC. 3. That the said cause shall then proceed with all practicable expedition to a final determination by said court of all rights drawn in question therein, and the said court shall have full power and jurisdiction by its decrees to determine every question of right, title, interest, or claim arising in the premises and to vacate, annul, set aside, or confirm any claim of any character arising or set forth in the premises; and its decree shall be final and conclusive upon all persons and corporations, or others, parties to the suit, or who shall fail, after public notice as hereinbefore in this Act provided, to appear in said court and litigate his, her, their, or its claim, and they shall be deemed forever barred from setting up or maintaining any right, title, interest, or claim in the premises.

SEC. 4. That if on the final hearing of said cause the said Supreme Court of the District of Columbia shall be of opinion that there exists any right, title, or interest in the land or water in this Act mentioned in any person, or corporation, or others, adverse to the complete and paramount right of the United States, the said court shall forthwith and in a summary way proceed to ascertain the value of any such right, title, interest, or claim, exclusive of the value of any improvement to the property covered by such right, title, or interest made by or under the authority of the United States, and report thereof shall be made to the Congress.

SEC. 5. That from the final decree of the Supreme Court of the District of Columbia, and every part thereof in the premises, an appeal shall be al-

lowed to the United States, and to any other party in the cause complaining of such decree, to the Supreme Court of the United States, which last-mentioned court shall have full power and jurisdiction to hear, try, and determine the said matter, and every part thereof, and to make final decree in the premises; and the said cause shall, on motion of the Attorney General of the United States, be advanced to the earliest practicable hearing.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
Conclusion	12

CITATIONS

Cases:

Bradshaw v. *Ashley*, 14 App. D. C. 485, affirmed 180 U. S. 59	9
Danforth v. *United States*, 308 U. S. 271	10, 11
District of Columbia v. *Cropley*, 23 App. D. C. 232	8
Greenleaf Lumber Co. v. *Garrison*, 237 U. S. 251	4, 5, 6
Kanakanui v. *United States*, 244 Fed. 923	11
Marine Ry. Co. v. *United States*, 257 U. S. 47	7
Martin v. *Waddell*, 16 Pet. 367	8
Monongahela Navigation Co. v. *United States*, 148 U. S. 312	6
Moody v. *Wickard*, 136 F. 2d 801, certiorari denied, 320 U. S. 775	11
Morris v. *United States*, 174 U. S. 196	7, 8, 9, 10, 11
Philadelphia Co. v. *Stimson*, 223 U. S. 605	4
Potomac Steamboat Co. v. *Upper Pot. S. Co.*, 109 U. S. 672	9
Shively v. *Bowlby*, 152 U. S. 1	8
Sioux Tribe v. *United States*, 316 U. S. 317	8
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592	4, 5
United States v. *Commodore Park*, 324 U. S. 386	4, 5, 6-7
United States v. *Dern*, 289 U. S. 352	5, 7
United States v. *Jones*, 109 U. S. 513	11
United States v. *River Rouge Co.*, 269 U. S. 411	4
Utah Power & Light Co. v. *United States*, 243 U. S. 389	8

Statutes:

Act of January 12, 1809, 2 Stat. 511, sec. 3	9
Act of March 3, 1901, 31 Stat. 1424, sec. 1574, as amended by the Act of June 30, 1902, 32 Stat. 544, D. C. Code (1940) sec. 1-605	9
Act of April 27, 1912, 37 Stat. 93, sec. 4	10

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 715

JAMES MARTIN, LOTTIE MAY MARTIN, AND THE SMOOT SAND AND GRAVEL CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 97) is reported under the name of *United States* v. *Groen* at 72 F. Supp. 713. The opinion of the Court of Appeals (R. 736-738) is reported at 177 F. 2d 733.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1949 (R. 739). By order of

the Chief Justice, dated January 25, 1950, the time for filing a petition for a writ of certiorari was extended to March 30, 1950 (R. 741). The petition for writ of certiorari was filed March 29, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the rights and title of riparian owners in the beds of the navigable streams of the District of Columbia are subordinate to the federal government's power to control navigation and commerce.

2. Whether title to the bed of the Anacostia River vested in the United States by cession from the State of Maryland.

3. Whether the trial court erred in determining the value of the petitioners' property.

STATEMENT

The facts of this case are stated in the Government's petition for a writ of certiorari to review the same judgment in No. 712, and hence will not be restated here. As appears there, the court below affirmed the judgment of the District Court holding that riparian owners of land on the Anacostia River have the right to fill and wharf into the river and that by exercising that right petitioners here have acquired title to land reclaimed by filling below the ordinary high-water mark of the river, the bed of which the lower courts recognized as owned by the

United States (R. 737-8; see Pet. in No. 712, pp. 8-9). The United States has filed a petition for a writ of certiorari, contending that the courts below erred in making this holding as to petitioners' right to fill and acquire the Government's title.

Petitioners here contend that the court below erred in placing a qualification upon their riparian rights and further that both lower courts erred in holding that the United States has title to the bed of the Anacostia River (subject only to petitioners' riparian rights) and in not holding that petitioners have title to the bed of the river to the channel thereof (as distinguished from a mere riparian right to acquire title to the bed by filling). Other grounds relate to alleged errors in valuing the rights which petitioners were held to have.

ARGUMENT

1. The court below held (R. 738) that "An owner of riparian land in Square East of 664 has a 'qualified right' to make fills and build wharves in the river." The qualification referred to arises out of the power of the federal government over the navigable waters of the United States in the regulation of commerce and navigation. Accordingly, the court below further held that "the fill and the wharf in suit may at any time be taken without compensation, in the interest of navigation, provided the taking is not arbitrary", and it directed that the judgment of the District Court be modified to so provide (R. 738).

For the reasons set out in the Government's petition for a writ of certiorari (No. 712), we believe the court below was in error in affirming the trial court's ruling as to the nature and extent of the riparian rights of petitioners here. However, if the trial court was to be affirmed in that respect, it was necessary to modify the judgment so as clearly to preserve the federal government's navigation powers. In so doing the court below relied upon decisions of this Court which clearly establish the correctness of this modification of the judgment. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 595-599; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251; see also *United States* v. *Commodore Park*, 324 U. S. 386, 390-391; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 634-638.

With one exception, none of the cases cited by petitioners under their first heading (Pet. 11-12) deals with the federal government's navigation powers. In the one which does deal with this question (*United States* v. *River Rouge Co.*, 269 U. S. 411), this Court reaffirmed (p. 419) the principle that rights of riparian owners are subordinate to the "absolute power of Congress over the improvement of navigable rivers." Insofar as that case held that the power might not be arbitrarily exercised (269 U. S., at 419), it was followed by the court below since the judgment contains an express proviso that the exercise of the navigation power must not be arbitrary (see R. 738).

Cases such as most of those cited at Pet. 11-12 which do no more than determine the nature and extent of the rights of a riparian owner below the ordinary high-water mark of a navigable stream are immaterial. Even when such an owner has title to the bed of the stream between high and low-water mark, that title and the right to make fill or erect structures between high and low-water mark are subject to the "dominant power of the government to control and regulate navigable waters in the interest of commerce, without payment of compensation * * *." *United States* v. *Commodore Park,* 324 U. S. 386, 390; see also *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 596; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251. That power is the same in the District of Columbia where, in addition to ownership of lands lying under water, the United States "has the plenary power to control navigation which was vested in the United States before the cession and which it exercises generally over navigable waters within the several states." *United States* v. *Dern,* 289 U. S. 352, 354. Accordingly, petitioners' right to make fills and build wharves in the river (even though it operates to give them title to the land filled) is necessarily subject to the navigation servitude.

Petitioners seek to avoid the effect of the foregoing decisions on the theory that since the Secretary of War had established harbor lines on the Anacostia River, their filling was done at the "invi-

tation" of the United States to improve navigation. Consequently, it is urged that petitioners acquired a vested right which cannot be impaired without compensation, and reliance is placed upon *Monongahela Navigat'n Co.* v. *United States,* 148 U. S. 312. A similar contention was made in *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, and was flatly rejected. It was there held that all privileges granted in public waters are subject to the sovereign navigation power which is perpetual and not exhausted by one exercise. See 237 U. S., at 259-260, 261-262. The situation in the *Monongahela* case, where a public work was constructed at the specific instance of and under the authority of the State and Congress, was distinguished from the situation like the present where an owner in the exercise of his riparian rights builds to the harbor line and avails himself of the navigability of the river for his own interest. 237 U. S., at 264-266.

The alleged cloud (if such it can be called) which petitioners assert is cast not only upon their own title to the filled land but upon the title of all riparian owners on navigable streams (Pet. 10) is one which exists entirely apart from the judgment below. It inheres in the sovereign power over navigation and commerce. As this Court pointed out in *United States* v. *Commodore Park,* 324 U. S. 386, 390, that power is dominant over any "technical" legal title to a part of the navigable stream's

bed, and (p. 391) "riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold."

Accordingly, it is submitted that the judgment of the court below in this respect was eminently correct, is supported by numerous decisions of this Court, and presents no question for review.

2. The courts below correctly held that title to the bed of the Anacostia River vested in the United States by virtue of the cession from Maryland. *Morris* v. *United States,* 174 U. S. 196, 226-230, 246; *Marine Ry. Co.* v. *United States,* 257 U. S. 47, 63; *United States* v. *Dern,* 289 U. S. 352, 354; see the Government's Petition in No. 712, this Term, p. 11. Although the trial court relied upon these cases (R. 105-106), petitioners make no effort to distinguish them—they do not, in fact, even mention them. None of the cases cited (Pet. 15-16) bear even remotely upon a contrary conclusion.

Petitioners attempted in the trial court to prove that the Commissioners appointed by the President to help lay out the city of Washington had conveyed land below high-water mark ("to the channel" of the river) to their predecessors (see Pet. 6-7, par. 10). They contend (Pet. 16) that the trial court erred in holding that the Commissioners had no authority to convey land below high-water mark. This argument must be based upon accept-

ance of their erroneous assertion that title to the bed of the river did not pass to the United States from the State of Maryland by the cession of 1791. However, as we have shown, that title, which was formerly in the State of Maryland, passed from the State to the United States. Since the riparian proprietors at the time of cession had no title to the bed of the stream, title to land below high-water mark could not have passed from them under their conveyances to the trustees designated to receive this property pursuant to the plan for the establishment of the city. See Pet. 3-4; Government's Pet. in No. 712, pp. 5-6. The Commissioners, in turn, had authority to allot to petitioners' predecessors *only* such lands as had been conveyed in trust for the laying out of the city by the original proprietors of Carrollsburg (see R. 315-316). Consequently, the trial court correctly held that the Commissioners had no authority to convey title below ordinary high-water mark. *Morris* v. *United States*, 174 U. S. 196, 232-237; *Shively* v. *Bowlby*, 152 U. S. 1, 13, 48, 58; *Martin* v. *Waddell*, 16 Pet. 367, 411; *Sioux Tribe* v. *United States*, 316 U. S. 317, 326; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404-405; *District of Columbia* v. *Cropley*, 23 App. D. C. 232, 243-246.

Moreover, the trial court excluded on other grounds the evidence by which petitioners sought to show the alleged allotments to their predecessors of land below high-water mark. (See R. 131-147;

Pet. 6-7, par. 10).[1] To support the conveyances thus alleged to have been made, petitioners now make the further contention that the courts below should have presumed that the alleged allotment of land in the river bed "was valid and was supported by a *prior right in the original proprietor.*" (Pet. 16-17; italics supplied). Numerous cases involving the presumption of a lost grant are then cited, apparently for the purpose of establishing that the original proprietors in Carrollsburg, rather than the State of Maryland, had title to the bed of the river at the time of the cession. However, petitioners overlook the fact that none of the requisites for resort to the doctrine of a lost grant is present in this case. For example, there is no evidence whatsoever that land below high-water mark had been occupied prior to the cession. In fact, while petitioners seek to have the rulings of the courts below reviewed on the ground that they should have presumed a lost grant sometime prior to 1791 from the State of Maryland to the original

[1] These items of evidence (certain documents from the National Archives) were excluded on the ground that they were not competent evidence of title. This ruling not only presents no question for review by this Court, but was correct, since the true records of the division of lots by the Commissioners are those lodged in the office of the Surveyor of the District of Columbia. *Bradshaw* v. *Ashley*, 14 App. D. C. 485, 485-487, affirmed on other grounds, 180 U. S. 59; see also Act of January 12, 1809, 2 Stat. 511, 512, sec. 3; Act of March 3, 1901, 31 Stat. 1424, c. 854, sec. 1574, as amended by the Act of June 30, 1902, 32 Stat. 544, c. 1329, D.C. Code (1940) sec. 1-605; *Potomac Steamboat Co.* v. *Upper Pot. S. Co.*, 109 U. S. 672, 680-682, 698; *Morris* v. *United States*, 174 U. S. 196, 276. The latter records were admitted in evidence on behalf of petitioners (R. 184-185).

proprietors in Carrollsburg or their predecessors, the only basis for such a presumption is in certain alleged possession of land below high-water mark many years after title had passed to the United States (see Pet. 6, par. 9).

3. Petitioners' contention that the trial court should not have held a hearing to determine the value of the title found to exist in petitioners is plainly without merit. The Act of April 27, 1912, 37 Stat. 93, sec. 4, specifically requires that such valuation be made and reported to Congress. This requirement may not be disregarded by the court, nor may the parties waive or withhold the question of value from the action of the court. *Morris* v. *United States,* 174 U. S. 196, 289-291.

The alleged impairment in the value of petitioners' property said to arise from the so-called cloud created by the valuation decree (Pet. 17-18) is not a compensable or preventable injury. If Congress should decide to take the property at the value fixed, petitioners will, of course, be paid the just compensation guaranteed by the Fifth Amendment for a taking of their property. If, on the other hand, Congress should elect not to take petitioners' property, there will have been no "taking" in the constitutional sense and petitioners will be entitled to no compensation for any inconvenience arising from the fact that they were required to have the value of their property judicially determined. *Danforth* v. *United States,* 308 U. S. 271,

283-286; *Kanakanui* v. *United States,* 244 Fed. 923 (C.A. 9).

In the ordinary condemnation proceeding, the determination of the value of the property sought is "an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost." *Danforth* v. *United States,* 308 U. S. 271, 284; see also *United States* v. *Jones,* 109 U. S. 513, 519; *Moody* v. *Wickard,* 136 F. 2d 801, 803 (C.A. D.C.), certiorari denied, 320 U. S. 775. While Congress ordinarily delegates to an administrative official the authority to determine whether particular property is needed for a public use and whether or not to accept a condemnation award, the statute in the instant case merely provides, in a different manner, the means of arriving at the same result. Both under the 1912 Act, here involved, and the similar act involved in *Morris* v. *United States,* 174 U. S. 196, Congress, instead of delegating such authority to an administrative official, retained for itself the determination whether the property should be acquired at the price fixed by the court. The result is the same.

Although petitioners assert that errors were committed in the valuation proceeding (Pet. 7-8, 10, 18), no authorities are cited and no reasons are

given to show any basis for review by this Court of the rulings in which the Court of Appeals found no error (R. 738).

CONCLUSION

The questions raised by this petition were correctly decided by the courts below, there is no conflict of decisions shown, and review of those questions is not warranted. The issues presented are separate from, and need not be considered along with, those raised in the Government's petition. They are not of the character meriting decision by this Court. This petition should, therefore, be denied and the certiorari allowed in this case limited to the questions presented by the Government's petition in No. 712.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
ROGER P. MARQUIS,
WILMA C. MARTIN,
Attorneys.

APRIL 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 803033 890